

# **Nos. 11-3440, 12-1027 & 12-1936**

---

## **UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

---

### **NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**and**

**1199 SEIU UNITED HEALTHCARE WORKERS EAST,  
N.J. REGION**

**Intervenor**

**v.**

**NEW VISTA NURSING AND REHABILITATION, LLC**

**Respondent/Cross-Petitioner**

---

**ON PANEL REHEARING OF AN APPLICATION FOR ENFORCEMENT  
AND CROSS-PETITIONS FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

---

### **BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

---

**JULIE B. BROIDO**  
*Supervisory Attorney*

**MILAKSHMI V. RAJAPAKSE**  
*Attorney*

**National Labor Relations Board  
1099 14th Street N.W.  
Washington, D.C. 20570  
(202) 273-2996  
(202) 273-1778**

**RICHARD F. GRIFFIN, JR.**

*General Counsel*

**JENNIFER ABRUZZO**

*Deputy General Counsel*

**JOHN H. FERGUSON**

*Associate General Counsel*

**LINDA DREEBEN**

*Deputy Associate General Counsel*

**National Labor Relations Board**

---

## **TABLE OF CONTENTS**

<b>Headings</b>	<b>Page(s)</b>
Statement of jurisdiction .....	1
Statement of the issue presented .....	3
Statement of related cases .....	4
Statement of the case.....	4
I. Findings of fact .....	5
A. Background: New Vista’s operations, staff, and organizational structure .....	5
B. Direction and discipline of the CNAs .....	6
II. The proceedings below.....	7
A. The representation proceeding .....	7
B. The unfair-labor-practice proceeding.....	8
III. The Board’s conclusions and order .....	9
IV. Subsequent Proceedings .....	10
Summary of argument.....	13
Argument .....	16
The Board properly certified the Union as the collective-bargaining representative of the New Vista’s LPNs, and therefore reasonably found that New Vista violated Section 8(a)(5) and (1) of the Act by refusing to bargain with and provide information to the Union .....	16

## **TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
A. Applicable principles and standard of review .....	16
B. New Vista failed to carry its burden of proving that its LPNs are supervisors under Act.....	18
1. New Vista did not establish that LPNs discipline CNAs or effectively recommend their discipline.....	18
a. New Vista’s limited evidence shows that LPNs only report misconduct.....	19
b. New Vista failed to show that LPN reports of misconduct automatically lead to discipline by operation of New Vista’s so-called progressive disciplinary system.....	27
c. New Vista failed to show that LPNs have authority to remove CNAs from the floor .....	31
2. The Court lacks jurisdiction to consider New Vista’s meritless argument that LPNs responsible direct CNAs .....	32
C. New Vista’s belated attempts to litigate changes it made to the LPNs’ duties are not properly before the Court and, in any event, lack merit .....	34
1. New Vista has waived any challenge to the Board’s finding that it cannot properly litigate, for the first time in the unfair-labor-practice case, changes it made to the LPNs’ duties during the representation case.....	35
2. In any event, the Board reasonably rejected, as procedurally improper, New Vista’s belated offer of previously available evidence.....	37
D. The Board’s August 26, 2011 final order is valid.....	42

## **TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
E. The Court should reject New Vista’s arguments that the case should be remanded.....	47
1. A proper Board quorum denied New Vista’s first motion for reconsideration .....	47
2. <i>Noel Canning</i> does not require a partial remand .....	53
Conclusion .....	56

## **TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>1621 Route 22 West Operating Co.</i> , 357 NLRB No. 153 (Dec. 30, 2011), <i>petition for review filed</i> , No. 12-1031 (3d Cir. Jan 9, 2012) .....	49
<i>Atkins v. United States</i> , 556 F.2d 1028 (Ct. Cl. 1977) .....	52
<i>Avante at Wilson, Inc.</i> , 348 NLRB 1056 (2006) .....	22-23
<i>Beverly Enters.-Mass, Inc. v. NLRB</i> , 165 F.3d 960 (D.C. Cir. 1999) .....	17-18, 23, 26
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964) .....	3
<i>Braniff Airways, Inc. v. Civil Aeronautics Board</i> , 379 F.2d 453 (D.C. Cir. 1967) .....	43, 44, 45
<i>Bricklayers, Local #5-N.J.</i> , 337 NLRB 168 (2001) .....	49
<i>Cable Car Advertisers, Inc.</i> , 336 NLRB 927 (2001), <i>enforced</i> , 53 F. App'x 467 (9th Cir. 2002) .....	49
<i>Caremore, Inc. v. NLRB</i> , 129 F.3d 365 (6th Cir. 1997) .....	25
<i>Chevron U.S.A.</i> , 309 NLRB 59 (1992) .....	23
<i>Children's Farm Home</i> , 324 NLRB 61 (1997) .....	21, 24

## **TABLE OF AUTHORITIES**

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Citizens Publ'g &amp; Printing Co. v. NLRB</i> , 263 F.3d 224 (3d Cir. 2001).....	18
<i>Cnty. Educ. Ctrs., Inc.</i> , 360 NLRB No. 17 (2014) .....	23
<i>Concourse Village, Inc.</i> , 276 NLRB 12 (1985) .....	28
<i>David B. Lilly Co. v. United States</i> , 571 F.2d 546 (Ct. Cl. 1978) .....	44
<i>DIRECTV U.S. DIRECTV Holdings LLC</i> , 357 NLRB No. 149 (2011) .....	24
<i>D.R. Horton, Inc. v. NLRB</i> , 737 F.3d 344 (5th Cir. 2013) .....	55
<i>East Michigan Care Corp.</i> , 246 NLRB 458 (1979), <i>enforced</i> , 655 F.2d 721 (6th Cir. 1981) .....	39
<i>Elmhurst Extended Care Facilities</i> , 329 NLRB 535 (1999) .....	22
<i>Fred Meyer Alaska, Inc.</i> , 334 NLRB 646 (2001) .....	23
<i>Frenchtown Acquisition Co. v. NLRB</i> , 683 F.3d 298 (6th Cir. 2012) .....	17, 21, 25
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999) .....	3
<i>Frisby v. HUD</i> , 755 F.2d 1052 (3d Cir. 1985).....	44

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Frito Lay, Inc.</i> , 177 NLRB 820 (1969) .....	14, 39, 40, 41, 42
<i>FTC v. Flotill Products, Inc.</i> , 389 U.S. 179 (1967).....	52
<i>G. Heileman Brewing Co.</i> , 290 NLRB 991 (1988), <i>enforced</i> , 879 F.2d 1526 (7th Cir. 1989) .....	49
<i>GGNSC Springfield LLC v. NLRB</i> , 721 F.3d 403 (6th Cir. 2013) .....	28, 29, 30
<i>Glenmark Assocs., Inc. v. NLRB</i> , 147 F.3d 333 (4th Cir. 1998) .....	25, 28-29, 30
<i>Golden Crest Healthcare</i> , 348 NLRB 727 (2006) .....	17
<i>Illinois Veterans Home at Anna L.P.</i> , 323 NLRB 890 (1997) .....	20-21
<i>IMS, P.C. v. Alvarez</i> , 129 F.3d 618 (D.C. Cir. 1997) .....	46
<i>Int’l Union, UAW v. NLRB</i> , 677 F.3d 276 (6th Cir. 2012) .....	2
<i>Kanawha Stone Co.</i> , 334 NLRB 235 (2001) .....	23
<i>Kronenberger v. NLRB</i> , 496 F.2d 18 (7th Cir. 1974) .....	2
<i>Lakeland Health Care Assocs., LLC v. NLRB</i> , 696 F.3d 1332 (11th Cir. 2012) .....	27

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Marquette Cement Mfg. Co. v. FTC</i> , 147 F.2d 589 (7th Cir. 1945) .....	53
<i>Mars Home for Youth v. NLRB</i> , 666 F.3d 850 (3d Cir. 2011).....	17, 18, 33
<i>McDonnell Douglas Corp.</i> , 324 NLRB 1202 (1997) .....	49
<i>McLeod v. INS</i> , 802 F.2d 89 (3d Cir. 1986).....	45
<i>Nat'l Archives &amp; Records Admin. v. Favish</i> , 541 U.S. 157 (2004).....	44
<i>New Process Steel, L.P. v. NLRB</i> , 130 S. Ct. 2635 (2010).....	43, 48, 50, 51
<i>New Vista Nursing &amp; Rehab.</i> , 358 NLRB No. 55 (2012), <i>application for enforcement filed</i> , No. 12-3524 (3d Cir. Sept. 11, 2012).....	9, 39
<i>New York Univ. Med. Ctr. v. NLRB</i> , 156 F.3d 405 (2d Cir. 1998).....	18, 26
<i>NLRB v. Acme Indus. Co.</i> , 385 U.S. 432 (1967).....	16
<i>NLRB v. Attleboro Assocs., Ltd.</i> , 176 F.3d 154 (3d Cir. 1999).....	25, 29, 30
<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267 (1974).....	17
<i>NLRB v. Donnelly Garment Co.</i> , 330 U.S. 219 (1947).....	45

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>NLRB v. Dover Tavern Owners' Assn.</i> , 412 F.2d 725 (3d Cir. 1969).....	37, 42
<i>NLRB v. Hilliard Dev. Corp.</i> , 187 F.3d 133 (1st Cir. 1999).....	21
<i>NLRB v. Kentucky River Cmty. Care, Inc.</i> , 532 U.S. 706 (2001).....	17
<i>NLRB v. Konig</i> , 79 F.3d 354 (3d Cir. 1996).....	33
<i>NLRB v. Meenan Oil Co.</i> , 139 F.3d 311 (2d Cir. 1998).....	21
<i>NLRB v. New Vista Nursing &amp; Rehab.</i> , 719 F.3d 203 (3d Cir. 2013).....	12, 13
<i>NLRB v. New Vista Nursing &amp; Rehab.</i> , (3d Cir. 12-3524).....	4
<i>NLRB v. Noel Canning</i> , 133 S. Ct. 2861 (Jun. 24, 2013) .....	12
<i>NLRB v. Noel Canning</i> , 134 S. Ct. 2550 (June 26, 2014) .....	12, 53, 55
<i>NLRB v. Res-Care, Inc.</i> , 705 F.2d 1461 (7th Cir. 1983) .....	17, 34
<i>NLRB v. Saint Mary Home</i> , 358 F. App'x 255 (2d Cir. 2009) .....	21
<i>Oak Park Nursing Care Ctr.</i> , 351 NLRB 27 (2007) .....	27, 28

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006) .....	17, 33
<i>Oil, Chem. &amp; Atomic Workers v. NLRB</i> , 445 F.2d 237 (D.C. Cir. 1971) .....	24, 26, 31
<i>Pace Univ. v. NLRB</i> , 514 F.3d 19 (D.C. Cir. 2008) .....	37
<i>Pacific Bell Tel. Co.</i> , 344 NLRB 243 (2005) .....	49
<i>Pittsburgh Plate Glass Co. v. NLRB</i> , 313 U.S. 146 (1941) .....	37
<i>RC Operator, LLC</i> , 4-RC-21728 (Sept. 13, 2010) .....	30
<i>Ritz-Carlton Hotel Co. v. NLRB</i> , 123 F.3d 760 (3d Cir. 1997) .....	32
<i>Schnurmacher Nursing Home v. NLRB</i> , 214 F.3d 260 (2d Cir. 2000) .....	20
<i>Siteman v. City of Allentown</i> , 695 A.2d 888 (Pa. Cmwlt. 1997) (court .....	53
<i>St. Anthony Hosp. Sys. v. NLRB</i> , 655 F.2d 1028 (10th Cir. 1981) .....	37
<i>Superior Indus. Int'l, Inc.</i> , 295 NLRB 320 (1989) .....	38-39
<i>Ten Broek Commons</i> , 320 NLRB 806 (1996) .....	28

## **TABLE OF AUTHORITIES**

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>The Boeing Co.</i> , 337 NLRB 152 .....	30
<i>The Ohio Masonic Home, Inc.</i> , 295 NLRB 390 (1989) .....	28
<i>The Republican Co.</i> , 361 NLRB No. 15 (2014) .....	23, 28
<i>United States v. Armstrong</i> , 517 U.S. 456 (1996) .....	44, 45
<i>United States v. Chem. Found., Inc.</i> , 272 U.S. 1 (1926) .....	45
<i>United States v. McCarrin</i> , 54 F.App'x 90 (3d Cir. 2002) .....	36
<i>United States v. Pelullo</i> , 399 F.3d 197 (3d Cir. 2005) .....	54
<i>United States v. Quinn</i> , 728 F.3d 243 (3d Cir. 2013) .....	36
<i>United States v. Will</i> , 449 U.S. 200 (1980) .....	52
<i>Valley v. Rapides Parish School Board</i> , 118 F.3d 1047 (5th Cir. 1997) .....	52
<i>Vance v. Ball State Univ.</i> , 133 S. Ct. 2434 (2013) .....	21
<i>Watkins Security Agency of DC, Inc.</i> , 357 NLRB No. 189 (2012) .....	30

## **TABLE OF AUTHORITIES**

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Waverly-Cedar Falls Health Care Ctr. v. NLRB</i> , 933 F.2d 626 (8th Cir. 1991) .....	21
<i>Woelke &amp; Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	33
 <b>Statutes:</b>	 <b>Page(s)</b>
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 2(3) (29 U.S.C. § 152(3)).....	16
Section 2(11) (29 U.S.C. § 152(11)).....	16, 17, 22, 26, 32
Section 3(b) (29 U.S.C. § 153(b)).....	48, 51, 52, 53
Section 7 (29 U.S.C. § 157) .....	10
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2, 10, 34
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2, 10, 16, 34
Section 9(c) (29 U.S.C. § 159(c)) .....	3
Section 9(d) (29 U.S.C. § 159(d)).....	3
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(e) (29 U.S.C. § 160(e)) .....	2, 32-33
Section 10(f) (29 U.S.C. § 160(f)) .....	2
 <b>Regulations:</b>	 <b>Page(s)</b>
29 C.F.R. 102.45(b), 102.68 .....	46
 <b>Electronic Sources:</b>	 <b>Page(s)</b>
NLRB, <i>Board Members Since 1935</i> , <a href="http://www.nlr.gov/who-we-are/board/board-members-1935">http://www.nlr.gov/who-we-are/board/board-members-1935</a> (last visited Nov. 25, 2014).....	43, 50

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

---

**Nos. 11-3440, 12-1027 & 12-1936**

---

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**and**

**1199 SEIU UNITED HEALTHCARE WORKERS EAST,  
N.J. REGION**

**Intervenor**

**v.**

**NEW VISTA NURSING AND REHABILITATION, LLC**

**Respondent/Cross-Petitioner**

---

**ON PANEL REHEARING OF AN APPLICATION FOR ENFORCEMENT  
AND CROSS-PETITIONS FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

---

**BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF JURISDICTION**

This case is presently before the Court on panel rehearing. It first came before the Court on the application of the National Labor Relations Board (“the

Board”) to enforce, and the cross-petitions of New Vista Nursing and Rehabilitation, LLC (“New Vista”) to review, a Board Decision and Order entered on August 26, 2011, and reported at 357 NLRB No. 69. (A 7-11.)<sup>1</sup> The Board found that New Vista violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”), by refusing to bargain with SEIU United Healthcare Workers East, N.J. Region (“the Union”) as the certified collective-bargaining representative of the licensed practical nurses (“LPNs”) employed at New Vista’s Newark, New Jersey facility, and to provide the Union with requested information. (A 9.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the Board’s Order is final, and the unfair labor practices occurred in Newark, New Jersey.<sup>2</sup>

---

<sup>1</sup> Record references are to the Joint Appendix (“A”). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to New Vista’s opening brief.

<sup>2</sup> New Vista asserts (Br. 34, 36-39, 51-53) that the order is not final because of challenges it mounts to the composition of the Board panels that denied its four motions for reconsideration. Those motions, however, did not render the Board’s August 26, 2011 unfair-labor-practice order less than final. *Int’l Union, UAW v. NLRB*, 677 F.3d 276, 277 (6th Cir. 2012); *Kronenberger v. NLRB*, 496 F.2d 18, 19 (7th Cir. 1974).

As the Board's Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding (Board Case No. 22-RC-13204) is before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Under Section 9(d), the Court has jurisdiction to review the Board's actions in the representation proceeding solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the Court's ruling. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

The Board filed its application for enforcement on September 14, 2011. New Vista filed its cross-petitions for review on January 9 and April 5, 2012. These filings were timely, as the Act places no time limit on the institution of proceedings to enforce or review Board orders.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether the Board properly certified the Union as the collective-bargaining representative of New Vista's LPNs, and therefore reasonably found that New Vista violated Section 8(a)(5) and (1) of the Act by refusing to bargain with and provide information to the Union.

## **STATEMENT OF RELATED CASES**

In *NLRB v. New Vista Nursing & Rehabilitation* (3d Cir. 12-3524), which the Court has placed in abeyance pending the resolution of this case, the Board seeks enforcement of its order finding that New Vista committed additional unfair labor practices against the LPNs at issue here.

## **STATEMENT OF THE CASE**

This case involves New Vista's refusal to bargain with and provide information to the Union, after a majority of New Vista's LPNs selected the Union as their collective-bargaining representative in a Board-conducted representation election. (A 7-9.) New Vista bases its refusal on its claim, which the Board rejected in the underlying representation proceeding, that the LPNs are supervisors under the Act. In the representation proceeding, the Board's Regional Director conducted a hearing at which the parties presented evidence concerning New Vista's supervisory-status claim. (A 63-397.) His findings, and the Board's subsequent findings and orders in the representation and unfair-labor-practice proceedings, are summarized below.

## **I. FINDINGS OF FACT**

### **A. Background: New Vista's Operations, Staff, and Organizational Structure**

New Vista operates a nursing and rehabilitative care facility that accommodates around 340 residents on three floors, with each floor divided into two units. (A 850-51; 23, 30, 77, 220.) It employs nurses, who are either LPNs or registered nurses ("RNs"), and certified nurse aides ("CNAs") to staff each unit in shifts, so that residents are cared for 24 hours a day, 7 days a week. (A 850-51; 74, 78-80.) On any given shift, a unit's nursing staff consists of one nurse (RN or LPN) and several CNAs. (A 851; 78.)

New Vista's 42 LPNs provide basic medical care to the residents in their respective units. (A 851, 854; 82, 84, 220, 332.) The CNAs perform more routine tasks including feeding, bathing, and dressing the residents. (A 851, 854; 84.)

During the day shift, nurses and CNAs are under the supervision of three unit managers, one for each floor. (A 850-51; 78-81.) During the evening and overnight shifts, nurses and CNAs are under a nursing supervisor who serves all three floors. (*Id.*) The unit managers and nursing supervisors report to Director of Nursing ("DON") Victoria Alfeche, who is on-site from around 8:00 a.m. to 6:00 p.m. every day and available by telephone at all other times. (A 850; 75-76, 174.)

## **B. Direction and Discipline of the CNAs**

Given the routine nature of the CNAs' tasks, they are not under continuous supervision. (A 854.) Instead, they log their activities in an "accountability book," which is periodically reviewed by the unit manager or clerical staff. (A 853; 307-13.) If a CNA has failed to log or complete an assigned task, the CNA may be subject to discipline. (*Id.*) Unit Manager Grace Tumamak, who manages the third floor, has prepared warnings for CNAs, based on errors she detected in the accountability books. (A 861; 307-13.)

In addition, if an LPN discovers that a resident is receiving improper care from a CNA, the LPN may speak to her and assist her in correcting the problem. (A 854; 368-72.) If the problem persists, the LPN may report it to the unit manager, either orally or on a company-provided form. (*Id.*) CNAs can also report problems involving other CNAs to a unit manager. (A 184-85, 238-39.)

To report a problem, an LPN can fill out a warning form, previously called a Notice of Corrective Action, on her own initiative or a unit manager's instructions. (A 855; 422-23.) The LPN enters information only in the form's top section, describing the problem. (A 872; 229-30, 266-67, 354-55.) The LPN leaves blank the other sections of the form—including the section on disciplinary action—and submits the partially completed form to a unit manager. (*Id.*) At that point, the unit manager investigates the problem by soliciting written reports from the CNA

and any witnesses, and gives the packet of information to DON Alfeche. (A 191-98, 209-12.)

Alfeche may return the packet to the unit manager for supplementation; otherwise, she reviews the CNA's file and determines the discipline to be imposed under New Vista's progressive disciplinary policy, which identifies the maximum allowable discipline for a first incident of misconduct and for subsequent offenses of the same type. (A 855; 191-98, 209-12, 583-85.) Alfeche has discretion to impose discipline below the maximum. (A 216-17.) She completes the process by entering the discipline she selected, signing the form, and presenting it to the CNA in the presence of a union representative. (*Id.*) There is no regular mechanism for LPNs who report misconduct to find out what, if any, discipline issued. (A 861-62; 191-98, 209-12.)

## **II. THE PROCEEDINGS BELOW**

### **A. The Representation Proceeding**

On January 25, 2011, the Union filed a representation petition seeking certification as the LPNs' representative. (A 848; 62.) New Vista maintained that the LPNs are supervisors and therefore cannot constitute an appropriate unit for collective bargaining. (A 848.) Following a hearing, the Regional Director issued a Decision and Direction of Election, finding that New Vista failed to meet its

burden of proving that the LPNs are supervisors. (A 849, 863, 878; 63-397.) He ordered a secret-ballot election in the petitioned-for unit. (A 878.)

New Vista sought Board review of that Decision, reiterating only its claim that LPNs are supervisors because they allegedly discipline or recommend CNAs' discipline. (A 881-96.) The Board (Chairman Liebman and Member Becker, Member Hayes dissenting) denied the request for review. (A 911.) In the election, LPNs voted 26 to 7 for the Union, with 4 challenged ballots—a number insufficient to affect the Union's victory. (A 39.) Accordingly, the Regional Director certified the Union as the LPNs' representative. (A 9; 912.)

Thereafter, the Union asked New Vista to negotiate an initial collective-bargaining agreement, and sought information concerning the unit. (A 9; 40-41.) New Vista refused those requests in order to test the certification in an unfair-labor-practice proceeding. (A 9; 42.)

### **B. The Unfair-Labor-Practice Proceeding**

Based on the Union's unfair-labor-practice charge, the Board's General Counsel issued a complaint alleging that New Vista violated the Act by refusing to bargain and to provide information. (A 7; 21, 23-29.) New Vista admitted its refusal, and the General Counsel filed a motion for summary judgment. (A 7; 30-38.) New Vista opposed summary judgment, contending for the first time that it had changed the LPNs' duties just before the representation election, which “could,

and likely did, change the finding that the LPNs were not supervisors.” (A 8; 48-49.)

### III. THE BOARD’S CONCLUSIONS AND ORDER

On August 26, 2011, the Board (Chairman Liebman, and Members Becker and Hayes) granted the General Counsel’s motion, finding that all representation issues raised by New Vista “were or could have been litigated in the prior representation proceeding,” and there was no other basis for reexamining that proceeding. (A 7.) In so ruling, the Board rejected (A 8) New Vista’s belated assertion, which it made for the first time in opposing summary judgment, that it had altered the LPNs’ duties during the representation proceeding so as to give them supervisory status. Given New Vista’s failure to bring the alleged changes to the Board’s attention in the representation proceeding, the Board found (*id.*) it “procedurally improper” for New Vista to raise those changes belatedly in opposing summary judgment.<sup>3</sup> Accordingly, the Board granted summary judgment

---

<sup>3</sup> The Board further noted (A 8 n.5) that New Vista was in an even weaker position to raise the changes in its defense, as they were themselves the subject of a separate unfair-labor-practice complaint (Board Case No. 22-CA-29845), which alleged that New Vista had changed the duties of its LPNs in order to convert them into statutory supervisors and thereby prevent them from obtaining union representation. *See New Vista Nursing & Rehab.*, 358 NLRB No. 55 (2012), *application for enforcement filed*, No. 12-3524 (3d Cir. Sept. 11, 2012) (in abeyance).

and found that New Vista violated Section 8(a)(5) and (1) of the Act by refusing to bargain with and provide information to the Union. (A 9.)

The Board's Order requires New Vista to cease and desist from the unfair labor practices found and from any like or related interference with employees' exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (*Id.*)

Affirmatively, it requires New Vista to: bargain with the Union upon request, and to embody any understanding reached in a signed agreement; furnish the requested information; and post a remedial notice. (A 9-10.)

#### **IV. SUBSEQUENT PROCEEDINGS**

A. Following the Board's issuance of its Decision and Order on August 26, 2011, New Vista filed a motion for reconsideration with the Board, repeating its claim that changes to the duties of the LPNs—made during the representation proceeding, but not raised until the unfair-labor-practice proceeding—rendered the LPNs statutory supervisors. (A 52.) New Vista argued (A 52-54) that the Board should have held a hearing to gather evidence about those changes in the unfair-labor-practice proceeding. In its motion, New Vista also asserted that the Board had issued its August 26 Decision and Order after Chairman Liebman's term expired. (A 51-54.) The Board (Members Becker and Hayes, Chairman Pearce recused) denied New Vista's motion on December 30, 2011. (A 12-14.)

B. In January and March 2012, New Vista filed two motions for reconsideration of the Board's December 30, 2011 order denying reconsideration. (A 55-59.) The first motion challenged Chairman Pearce's involvement in the December 30 order, and the second challenged Member Becker's involvement in that order, claiming that his term had ended prior to December 30. (*Id.*) The Board (Members Hayes, Griffin, and Block) denied both motions (on March 15 and 27, 2012, respectively). (A 15-18.) On March 22, 2012, New Vista filed another motion for reconsideration, adding to its earlier challenges the claim that Members Griffin and Block, both of whom had participated in the Board's March 15 refusal to reconsider the December 30, 2011 order, were not validly appointed to the Board in 2012. (A 60-61.) The Board's March 27, 2012 order addressed and denied this last motion. (A 17-18.)

C. Subsequently, on appeal in this Court, the parties briefed and argued the supervisory-status issues underlying the Board's August 26, 2011 Decision and Order. New Vista also challenged the issuance of the August 26, 2011 Decision and Order, maintaining that Chairman Liebman was no longer on the Board at the time. In its June 2012 opening brief, however, New Vista did not challenge the Board's rejection of its belated attempt to argue, in the unfair-labor-practice case, that it had altered the LPNs' duties during the representation proceeding.

On May 16, 2013, the Court issued its decision. *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013). The Court held that New Vista had failed to show that Chairman Liebman's term expired before the Board issued its August 26, 2011 Decision and Order. *Id.* at 215. Nevertheless, the Court found, *sua sponte*, that there was no quorum for issuance of the August 26 Decision and Order because another Board member on the panel (Craig Becker) was invalidly appointed during an intra-session congressional recess. *Id.* at 213, 244.

Thereafter, the Board petitioned for panel rehearing, and the Court held the proceedings in abeyance pending the Supreme Court's decision in *NLRB v. Noel Canning*, 133 S. Ct. 2861 (Jun. 24, 2013) (granting certiorari). On June 26, 2014, the Supreme Court issued its decision in *Noel Canning*, holding that the President's appointments on January 4, 2012, of Members Block, Griffin, and Flynn were not authorized by the Recess Appointments Clause of the Constitution because the Senate was not in a sufficiently lengthy recess when the appointments were made. 134 S. Ct. 2550, 2574, 2578. However, the Supreme Court also held that recess appointments may be made during intra-session as well as inter-session recesses. *Id.* at 2567, 2578.

After the parties filed supplemental pleadings addressing the implications of *Noel Canning*, the Court granted panel rehearing and vacated its earlier decision. The Court then issued an order directing the parties to "rebrief this matter in its

entirety,” but providing that “[a]ny issues not specifically listed in the statement of issues and briefed, even though the issue may have been addressed in our initial adjudication in *NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203 (3d Cir. 2013), shall be deemed abandoned.” (*Id.*)

### **SUMMARY OF ARGUMENT**

The Board reasonably found that New Vista failed to meet its burden of showing that its LPNs are supervisors under the Act. It failed to establish that the LPNs’ purported authority to prepare warning forms and remove CNAs from the floor imbues them with supervisory status. Moreover, its claim that LPNs responsibly direct CNAs is not properly before the Court and, in any event, lacks merit because New Vista failed to show that LPNs are “responsible”—meaning accountable—for CNAs’ work. As New Vista thus failed to carry its burden of proving that its LPNs are supervisors, its refusal to bargain and provide information is unlawful.

New Vista now argues that during the underlying representation proceeding, it changed the LPNs’ duties, thereby transforming them into statutory supervisors. New Vista, however, failed to raise this argument in its initial June 13, 2012 opening brief. Therefore it is not properly before the Court under the terms of the rehearing order. In any event, the Board reasonably rejected this argument, finding that it was a procedurally improper effort to litigate, in the unfair-labor-practice

proceeding, alleged factual changes that could have been but were not raised and litigated in the underlying representation proceeding. The case upon which New Vista relies, *Frito Lay, Inc.*, 177 NLRB 820 (1969), involved very different circumstances and provides no support for New Vista's argument that the Board departed from precedent in not considering the changed duties in the unfair-labor-practice case.

There is no merit in New Vista's argument that the Board's August 26, 2011 unfair-labor-practice Order is invalid because it was not "issued" to the parties or posted on the Board's website until after the term of one participating Board member (Chairman Liebman) expired on August 27, 2011. The date specified on the Order—August 26, 2011—is the date on which all members had taken final action by voting on the final draft, and Chairman Liebman was indisputably on the Board that day. Under settled principles of administrative law, the validity of an agency order does not turn on whether all participating members remained for completion of ministerial functions such as service of the order. Accordingly, the Court should apply controlling precedent to find that New Vista failed to show any irregularity to warrant questioning that the Board concluded its deliberative process and took final action as of the Order's date.

Finally, the Court should reject New Vista's arguments that the case should be partially remanded to the Board. First, there is no merit to New Vista's

argument that the Board lacked a properly constituted quorum when it entered its December 30, 2011 reconsideration order. The Board's delegation of the reconsideration motion to a three-member panel on December 30, 2011, was consistent with the text of Section 3(b). It also followed the Board's longstanding practice when it has only three sitting members, one of whom is recused from a particular matter, a practice recognized approvingly in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

Nor should the Court remand the case for the Board to rule on additional motions for reconsideration filed by New Vista in January and March 2012, which asserted procedural errors in the Board's December 30, 2011 disposition of New Vista's first motion for reconsideration. Although under the Supreme Court's decision in *Noel Canning*, the Board panel that ruled on those motions was not properly constituted, in the circumstances of this case it is not necessary for a properly constituted Board to rule on New Vista's motions for reconsideration of its December 30 ruling. This is so because New Vista has failed to establish, as a matter of law, any impropriety in the delegation process followed by the Board panel that issued the December 30 order.

## ARGUMENT

### **THE BOARD PROPERLY CERTIFIED THE UNION AS THE COLLECTIVE-BARGAINING REPRESENTATIVE OF NEW VISTA'S LPNs, AND THEREFORE REASONABLY FOUND THAT NEW VISTA VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH AND PROVIDE INFORMATION TO THE UNION**

#### **A. Applicable Principles and Standard of Review**

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees ....” An employer violates this provision not only by refusing to bargain outright, but also by refusing to provide its employees’ representative with requested information relevant to collective bargaining. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967). Here, New Vista has admittedly (Br. 16) refused to bargain and provide information in order to challenge the Union’s certification as the LPNs’ representative. New Vista specifically claims the LPNs are statutory supervisors, who are excluded from the Act’s protections. *See* 29 U.S.C. § 152(3).

Section 2(11) of the Act (29 U.S.C. § 152(11)) states, in relevant part, that a “supervisor” is “any individual having authority, in the interest of the employer, to . . . discipline other employees, or responsibly to direct them . . . or effectively to recommend such action,” provided that “the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” Thus, individuals are statutory supervisors only if “(1) they have the authority to

engage in a listed supervisory function, (2) their exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer.” *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001); accord *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). In interpreting Section 2(11), the Board is mindful of the statutory goal of distinguishing truly supervisory personnel, who are vested with “genuine management prerogatives,” from employees who enjoy the Act’s protections even though they perform “minor supervisory duties.” *Oakwood*, 348 NLRB at 688 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974)).

The party asserting supervisory status bears the burden of proving that status by a preponderance of the evidence. *Mars Home for Youth v. NLRB*, 666 F.3d 850, 854 (3d Cir. 2011). The assertion must be supported with specific examples, based on record evidence. *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012). Conclusory or generalized testimony is insufficient to establish that individuals actually possess supervisory authority. See, e.g., *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983); *Golden Crest Healthcare*, 348 NLRB 727, 731 (2006). Nor is theoretical or “paper power”—as in a job description—sufficient to prove supervisory status. *Beverly Enters.-Mass, Inc. v. NLRB*, 165

F.3d 960, 962-63 (D.C. Cir. 1999); *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 414 (2d Cir. 1998).

Whether an individual is a statutory supervisor is a question of fact particularly suited to the Board's expertise and therefore subject to limited judicial review. *Mars Home*, 666 F.3d at 853. The Board's supervisory-status determination must be upheld so long as it is supported by substantial evidence, "even if [the Court] would have made a contrary determination had the matter been before [it] de novo." *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001).

### **B. New Vista Failed To Carry Its Burden of Proving that Its LPNs Are Supervisors under the Act**

New Vista claims that the 42 LPNs are supervisors because they discipline or effectively recommend discipline of CNAs, and responsibly direct CNAs' work. (Br. 53-68). For the reasons explained below, both claims must be rejected.

#### **1. New Vista did not establish that LPNs discipline CNAs or effectively recommend their discipline**

New Vista argues (Br. 55-66) that its LPNs are supervisors because they prepare warning forms that can lead to CNA discipline, and they remove CNAs from the floor for insubordination. However, the Board reasonably found that the LPNs' role is purely reportorial, not disciplinary (A 870), and that New Vista failed to establish that LPNs can remove CNAs from the floor (A 877).

**a. New Vista's limited evidence shows that LPNs only report misconduct**

In arguing (Br. 59-60) that its LPNs have authority to discipline CNAs, New Vista mainly relies on 33 warning forms purportedly prepared by LPNs over a 6½ year period. (A 422-532.) New Vista, however, grossly overstates the import of these forms, which merely show LPNs occasionally providing factual descriptions of misconduct that managers may act upon in their discretion and without further LPN involvement.

First, the Board reasonably declined to rely (A 871) on 19 of the 33 forms—prepared by Unit Manager Tumamak—because at all relevant times she occupied a position of greater authority than the LPNs. (A 871; 235-37.) Indeed, she was serving exclusively as unit manager when she prepared 8 of the forms. And she occupied a dual role—as unit manager on the day shift and LPN on the night shift—when she prepared the 11 remaining forms. (A 235-37.) Testifying as to her role in preparing those 11 forms, Tumamak admitted to acting at times on her greater authority as a unit manager. (A 871; 303-08.) Given her testimony, it could not be determined which forms, if any, reflected her authority solely as an LPN. The Board therefore appropriately discounted the 19 forms initiated by Tumamak. (A 871.)

Of the 14 remaining forms, New Vista presented LPN testimony concerning only 3, and the LPNs involved—Simon Ramirez, Marisol Roldan, and Abosede

Adekanmbi—testified that they merely described incidents on the form’s top portion. (A 872; 229-30, 266-67, 354-55, 425, 523-24, 624.) They left blank the section for noting discipline or “action to be taken,” and passed on to their managers partially completed forms containing only factual information. (A 872; 230, 355-56, 266-67, 282-83.) Adekanmbi, moreover, admitted that she acted on Tumamak’s express instructions. (A 872; 354-56.)

Far from contradicting the testimony of these LPNs, DON Alfeche confirmed that LPNs merely describe an incident and have no role in any ensuing disciplinary process. Thus, she testified that LPNs are not consulted or updated after submitting factual information, and are not present when discipline is issued. (A 861-62.) Instead, Alfeche and the unit managers take over the partially completed forms, conducting their own investigation, determining the level of punishment, and issuing the discipline.

The evidence accordingly is clear that LPNs merely refer incidents to nurse managers who then take the action that they deem appropriate. Such “referrals [of misconduct], by themselves, do not establish disciplinary authority as a matter of law.” *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265-66 (2d Cir. 2000). Consistent with this principle, the Board found (A 872) that the LPNs’ involvement in this purely “reportorial” activity does not bespeak authority to discipline under the Act. *See Illinois Veterans Home at Anna L.P.*, 323 NLRB

890, 890 (1997) (factual accounts of misconduct on “warning” forms not disciplinary, but “merely reportorial” and not indicative of supervisory status); accord *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 308 (6th Cir. 2012); *NLRB v. Saint Mary Home*, 358 F. App’x 255, 257-58 (2d Cir. 2009); *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 147 (1st Cir. 1999). And the mere fact that the LPNs’ reports “may result in discipline” does not warrant a different finding. *NLRB v. Meenan Oil Co.*, 139 F.3d 311, 322 (2d Cir. 1998) (holding it “irrelevant” to the issue of supervisory status that discipline “may result” from employee’s factual report).<sup>4</sup>

Moreover, excluding the 19 forms prepared by Tumamak, the three forms testified to by LPNs Ramirez, Roldan, and Adekanmbi, and an additional form that

---

<sup>4</sup> Indeed, authority to discipline is not established even by warnings—much less by mere reports, as here—that do not themselves affect job status. See *Waverly-Cedar Falls Health Care Ctr. v. NLRB*, 933 F.2d 626, 630 (8th Cir. 1991) (finding that LPNs’ authority to issue written and oral warnings to aides not supervisory where “the Director of Nursing controls all disciplinary action and warnings alone do not affect job status”); *Children’s Farm Home*, 324 NLRB 61, 61 (1997) (team leader’s issuance of two warnings of “the possibility of ‘further disciplinary action, including immediate termination’ in the case of future inappropriate conduct” insufficient to establish supervisory status where “the Employer did not show that either of these warnings affected the subject employee’s job status or constituted evidence that [the team leader] possessed the authority to discipline . . . .”); and cases discussed pp. 27-30 below. Cf. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443, 2445 & n.7 (2013) (in context of determining scope of employer’s vicarious liability for supervisory actions under Title VII, Court adopted test requiring that employer empowered putative supervisor “to take tangible employment actions,” which “effect a significant change in employment status,” and noting that the Board has used an impact-on-job-status test in some circumstances).

post-dated the Union's petition (A 876; 422), New Vista is left with just 10 forms to establish its supervisory-status claim. As to those 10 forms, however, New Vista failed to present any testimony explaining their genesis by their purported authors. Consequently, New Vista could not explain why the forms contained different handwriting in the top and bottom sections, or why some forms were unsigned by any LPN. (A 861, 876; 423, 426, 434, 483, 494, 513-14, 531, 670, 682.) Particularly given the three LPN witnesses' statements that they merely made factual reports, the 10 forms—barren of any testimony by the individuals who purportedly prepared them—do not enable New Vista to meet its burden of proving supervisory status. *See Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 n.8 (1999) (any lack of evidence in the record is to be construed against the party asserting supervisory status).

Nevertheless, as the Board noted (A 876), even assuming *arguendo* that the 10 reports constituted discipline or effective recommendation, such “a minor number of instances over a six-year period...[in] a bargaining unit of 42 LPNs” would not suffice to establish supervisory status. Contrary to New Vista (Br. 57-59), the Board did not err in expressing reluctance to rely on such sparse evidence. “Although Section 2(11) requires only possession of *authority* to carry out an enumerated supervisory function, not its actual exercise, the evidence still must suffice to show that [the claimed] authority actually exists.” *Avante at Wilson*,

*Inc.*, 348 NLRB 1056, 1057 (2006); *accord Cmty. Educ. Ctrs., Inc.*, 360 NLRB No. 17, slip op. at 7 (2014). Accordingly, to “avoid unnecessarily stripping workers of their organizational rights” (*Beverly Enters.-Mass*, 165 F.3d at 962), the Board is cautious where evidence of actual exercise is lacking, and it will not infer that an individual has supervisory authority based on “isolated and infrequent incidents of supervision.”<sup>5</sup> *Chevron U.S.A.*, 309 NLRB 59, 61 (1992); *see also The Republican Co.*, 361 NLRB No. 15, slip op. at 8 (2014) (citing *Chevron U.S.A.* and similar cases declining to find supervisory status based on sporadic exercise of supervisory authority). Consistent with these principles, the Board reasonably found (A 876) that the 10 forms at issue—which suggest, at most, the exercise of supervisory authority in a sporadic manner—could not transform the LPNs into statutory supervisors. *See Kanawha Stone Co.*, 334 NLRB 235, 237 (2001) (employee’s sporadic exercise of supervisory authority over eight-year period did not make him a supervisor).

---

<sup>5</sup> *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001), cited by *New Vista* (Br. 58-59), is not to the contrary. In that case, the Board found that a meat department manager who “ha[d] not had occasion to hire anyone” nevertheless “possesse[d]” the authority to hire or effectively recommend the hiring of employees, given that other meat department managers in the employer’s highly standardized operation, as well as those in analogous classifications, had hired or effectively recommended the hiring of employees on numerous specific occasions. 334 NLRB at 646, 647, 649 & nn.8-9.

As the Board further found (A 872-83), the record fails to support New Vista's related claim (Br. 62) that LPNs "effectively recommend" discipline. There is no documentary evidence of any recommendation by an LPN. Although DON Alfeche conclusorily testified that LPNs effectively recommend discipline, and LPNs Ramirez and Roldan testified that, on occasions not captured by any documentary evidence, they recommended discharge, the Board reasonably found those vague and uncorroborated assertions unpersuasive. (A 874; 230-31, 273-74.) *See Oil, Chem. & Atomic Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) ("what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority").

Not only do LPNs not recommend discipline, DON Alfeche's testimony clearly establishes that any incident they describe on a partially completed warning form is subject to independent investigation by nursing managers. And under Board precedent, such independent investigation undercuts any claim of authority to effectively recommend discipline, since "authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." *Children's Farm Home*, 324 NLRB 61, 61 (1997); *accord DIRECTV U.S. DIRECTV Holdings LLC*, 357 NLRB No. 149, slip op. at 3 & n.11 (2011) (finding that field supervisors lacked authority to effectively recommend

discipline, where employee counseling forms they prepared were subject to independent investigation, including management review of employee's past performance and corrective measures, before approved and issued).

In an effort to avoid this obviously adverse precedent, New Vista cites (Br. 63) cases observing that “the [Act] does not preclude supervisory status simply because the recommendation is subject to a superior’s investigation.” *Glenmark Assocs., Inc. v. NLRB*, 147 F.3d 333, 342 (4th Cir. 1998), *cited in NLRB v. Attleboro Assocs., Ltd.*, 176 F.3d 154, 164 (3d Cir. 1999); *accord Caremore, Inc. v. NLRB*, 129 F.3d 365, 370 (6th Cir. 1997). But such cases do not advance New Vista’s cause. As the Sixth Circuit recently clarified, “a ruling that a manager’s independent investigation does not *preclude* a finding of supervisory status is a far cry from holding that the existence of that investigation does not matter.” *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 309 n.7 (6th Cir. 2012) (noting that independent investigation into recommendations is “a key factor that must be considered when undertaking the highly fact-intense inquiry to determine whether an alleged supervisor effectively recommends discipline”).

Here, the Board properly considered it relevant that the LPNs’ reports of misconduct could not have any effect until higher-level officials had conducted a thorough, independent investigation of the matters reported. New Vista offers no persuasive reason why, in the face of such evidence, the LPN reports should be

deemed “effective” recommendations of discipline. *See also* pp. 27-30 below.

Thus, both the record and relevant precedent support the Board’s finding that New Vista’s LPNs do not effectively recommend discipline within the meaning of Section 2(11) of the Act.

Given the Board’s well-supported finding that the LPNs do not discipline CNAs or effectively recommend their discipline, it is irrelevant that New Vista “notified” (Br. 58) the LPNs that they could “initiate appropriate action and recommend disciplinary action.” As the Board found (A 864), such statements by management purporting to confer supervisory authority are unpersuasive “absent independent evidence of the possession of the described authority.” *See Beverly Enters.-Mass.*, 165 F.3d 960, 963 (D.C. Cir. 1999) (noting that where evidence of supervisory authority actually exercised is lacking, “there must be other affirmative indications of authority,” and “[s]tatements by management purporting to confer authority do not alone suffice”); *Oil, Chem. & Atomic Workers*, 445 F.2d at 243 (noting that “beyond the [management] statements or directives themselves, what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.”).

“Theoretical or paper power does not a supervisor make.” *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 414 (2d Cir. 1998).

**b. New Vista failed to show that LPN reports of misconduct automatically lead to discipline by operation of New Vista's so-called progressive disciplinary system**

Notwithstanding the evidence that LPNs merely refer factual reports of misconduct to managers, New Vista insists (Br. 58, 60-62) that they are supervisors because they “initiate” a progressive disciplinary process that “can result” in job-affecting discipline. In so arguing, New Vista erroneously relies on *Oak Park Nursing Care Ctr.*, 351 NLRB 27, 27-29 (2007), which found LPNs to be supervisors based on their role in a progressive disciplinary system far more defined than New Vista's. There, the LPNs were not merely using company-issued forms to pass on factual reports of misconduct to managers. They were empowered to document employee infractions on counseling forms that corresponded to specific, progressive steps in a disciplinary system. Moreover, in *Oak Park*, an accumulation of counseling forms would automatically lead to suspension and ultimately discharge.<sup>6</sup> *Id.* at 28-29.

By contrast, New Vista's warning forms do not correspond to specific disciplinary steps, and do not automatically lead to suspension or discharge.

---

<sup>6</sup> Similarly, in *Lakeland Health Care Assocs., LLC v. NLRB*, the court, in concluding that team leader LPNs were supervisors, found that LPNs could independently issue “coachings” that automatically led to suspension and termination under the progressive disciplinary system. 696 F.3d 1332, 1336-37 (11th Cir. 2012).

(A583-85.) *See The Republican Co.*, 361 NLRB No. 15, slip op. at 7 (2014) (issuance of warnings not reflective of supervisory authority, where employer failed to prove it had “a defined progressive disciplinary system” under which warnings would “automatically or routinely lead[] to job-affecting discipline” (internal quotation marks omitted)); *The Ohio Masonic Home*, 295 NLRB at 394 (no defined progressive disciplinary system because issuance of written warnings does not without more “automatically affect job status or tenure”). Instead, on paper New Vista’s policy broadly sets forth maximum penalties, and in practice confers on DON Alfeche discretion to determine the level of discipline in any given instance. (A 216-17, 583-85.) In short, the record fails to show that New Vista has a defined progressive disciplinary system that “predetermine[s] discipline based solely on the receipt of a certain, set number of warnings.” *Ten Broek Commons*, 320 NLRB 806, 809 (1996). Accordingly, New Vista cannot reasonably claim that its LPNs “lay[] the foundation” for future discipline as in *Oak Park*. 351 NLRB at 28-29. *Cf. Concourse Village, Inc.*, 276 NLRB 12, 13 (1985) (progressive disciplinary policy expressly provided that receipt of three written warnings, issued independently by putative supervisors, would result in termination).

For similar reasons, New Vista errs (Br. 56, 61-63) in relying on *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403 (6th Cir. 2013), *Glenmark Assocs., Inc. v.*

*NLRB*, 147 F.3d 333 (4th Cir. 1998), and *NLRB v. Attleboro Assocs., Ltd.*, 176 F.3d 154 (3d Cir. 1999). In those cases, unlike here, the courts found that the charge nurses issued write-ups to CNAs that corresponded to specific steps in a progressive disciplinary system. Thus, the court in *GGNSC* held that the nurse-prepared write-ups “[we]re discipline” because each one would “lead[] automatically to a written warning, which is a ‘step’ in the [employer’s] system of progressive discipline,” with the fourth warning triggering automatic suspension pending investigation. 721 F.3d at 409, 411. The *Glenmark* court likewise held that the write-ups there were disciplinary actions in themselves because they constituted the first step in the employer’s system of progressive discipline and placed the CNA on a track that “automatically” called for certain defined disciplinary actions based on subsequent offenses, culminating in termination on the fourth offense. 147 F.3d at 337, 344. Along the same lines, this Court in *Attleboro* held that the LPN-issued write-ups there were at least effective recommendations of discipline, inasmuch as they played a definite role in a progressive disciplinary system similar to that in *Glenmark*, and included recommendations as to disciplinary action that were only “sometimes” reviewed by higher-level officials. 176 F.3d at 158, 164-65. By contrast, New Vista’s progressive disciplinary system assigns no particular significance to the LPNs’

written accounts of misconduct, and accordingly those accounts cannot qualify as discipline under *GGNSC*, *Glenmark*, or *Attleboro*.<sup>7</sup>

New Vista also does not help itself by citing (Br. 59-60, 61-62) unpublished decisions issued by the Board's Regional Directors that have no precedential value. *See The Boeing Co.*, 337 NLRB 152, 153 n.4 (attaching no weight to a Regional Director's decision because "unreviewed Regional Director's decisions have no precedential value"); *see also Watkins Security Agency of DC, Inc.*, 357 NLRB No. 189, slip op. at 2 (2012) (explaining that a Regional Director's decision becomes precedential only if adopted by the Board). In any event, as the Board noted (A 875), by way of example, *RC Operator, LLC*, 4-RC-21728 (Sept. 13, 2010), is factually distinguishable from the present case, because there "the charge nurse herself determined the level of [progressive] discipline to be meted out and did not consult with any higher authorities prior to issuing the discipline." That is patently not the case here.

---

<sup>7</sup> Nor do the LPNs' reports qualify as effective recommendations of discipline under *Attleboro*. As explained above pp. 24-26, the LPNs here neither complete nor issue warning forms to CNAs, and the forms they partially complete contain no disciplinary recommendations and are always reviewed by management officials. Accordingly, the LPNs' relationship to the disciplinary process is highly attenuated and unlike that of the nurses who were found to be supervisors in *Attleboro*. *See* 176 F.2d at 164-65.

**c. New Vista failed to show that LPNs have authority to remove CNAs from the floor**

New Vista also asserts (Br. 62) that the LPNs exercise disciplinary authority because they can remove CNAs from the floor for insubordination. The Board properly found, however, that the testimony presented by New Vista to support its claim failed to establish with the requisite specificity that LPNs actually possess such authority. *See Oil, Chem. & Atomic Workers*, 445 F.2d at 243 (requiring tangible examples of actual supervisory authority).

LPN Roldan testified that over 10 years ago, before New Vista owned the facility, she directed an insubordinate CNA to leave the floor and go to a supervisor's office. (A 255-56.) She further testified that the CNA was later terminated on her recommendation, but she could not recall the CNA's name or any details. (*Id.*) Likewise, LPN Simon Ramirez testified that, over 3 years ago, he ordered an abusive CNA off the floor to speak with a supervisor, but he could not recall the CNA's name or the details of the incident. (A 278.)

Given this "skeletal offering," the Board reasonably found (A 877) that New Vista failed to prove that its LPNs can and do remove CNAs from the floor for insubordination. Although New Vista appears to challenge (Br. 62, 65) the Board's adverse finding on this point, it does not take issue with the Board's recitation of the meager testimony presented, nor does it claim that the Board overlooked other evidence.

Finally, given New Vista's failure to establish that its LPNs have statutory authority to discipline CNAs or effectively recommend their discipline, there is no cause to consider its further claim (Br. 60, 63-65), that they use independent judgment in exercising such authority. Accordingly, the cases cited by New Vista (*id.*), for the general proposition that nurses may exercise independent judgment in writing up CNAs or removing them from the floor, are beside the point. Where, as here, the employer has failed to prove that the putative supervisors exercise a Section 2(11) authority, there simply is no occasion to proceed to the question of independent judgment.

**2. The Court lacks jurisdiction to consider New Vista's  
meritless argument that LPNs responsibly direct  
CNAs**

New Vista's argument (Br. 66-68) that its LPNs are supervisors because they responsibly direct CNAs is not properly before the Court. New Vista failed to raise its argument to the Board in the underlying representation proceeding. *See Ritz-Carlton Hotel Co. v. NLRB*, 123 F.3d 760, 763-65 (3d Cir. 1997) (any challenge to Regional Director's unit determination must be timely raised to the Board in representation proceeding, otherwise forfeited in subsequent unfair-labor-practice proceeding). Consequently, the Court lacks jurisdiction to consider New Vista's responsible-direction argument. *See* 29 U.S.C. §160(e) ("[n]o objection that has not been urged before the Board...shall be considered by the court" absent

extraordinary circumstances); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (§ 160(e) imposes jurisdictional bar preventing court from considering issues not raised before the Board); *NLRB v. Konig*, 79 F.3d 354, 359 (3d Cir. 1996) (same).

In any event, New Vista's argument is meritless. For direction to be "responsible," the person giving it "must be accountable for the performance of the task by the other, such that some adverse consequence may befall [the person giving direction] if the tasks performed by the employee are not performed properly." *Oakwood Healthcare*, 348 NLRB at 691-92. *Accord Mars Home for Youth v. NLRB*, 666 F.3d 850, 854 (3d Cir. 2011) (upholding this interpretation of responsible direction).

New Vista presented no evidence that LPNs have been disciplined, or faced the prospect of discipline, based on poor CNA performance. Of the 166 disciplines issued to LPNs over the years, not one is based on a failure to properly oversee faulty CNA work. (A 869; 379-80, 683-847.) None of the five LPN witnesses testified that they had ever faced, or could face, discipline based on CNA performance. Even DON Alfeche could not identify a single instance where an LPN received discipline for that reason. (A 188-89.) As for New Vista's assertion (Br. 67-68) that Alfeche testified LPNs "can be disciplined for failure to properly supervise," the record contains no such testimony and, in any event, such a

generalized claim would not meet New Vista's burden of proof. *See NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983) (evidence "limited very largely to the administrator's general assertions" insufficient to show supervisory status).

In sum, the Board reasonably found (A 863, 878) that New Vista failed to meet its burden of proving the supervisory status of its LPNs. Accordingly, by refusing to bargain with and furnish requested information to the Union as the LPNs' representative, New Vista violated Section 8(a)(5) and (1) of the Act.

**C. New Vista's Belated Attempts To Litigate Changes It Made to the LPNs' Duties Are Not Properly Before the Court and, in any Event, Lack Merit**

After the General Counsel moved for summary judgment based on New Vista's admitted refusal to bargain with the Union, New Vista argued (A 48-50) for the first time that on March 25, 2011—while the representation proceeding was ongoing—it had altered the duties of its LPNs to assure their supervisory status. The Board properly rejected (A 8) this argument in its August 26, 2011 Decision and Order, and again in its December 30, 2011 order denying New Vista's motion for reconsideration, finding that it was a procedurally improper attempt to litigate, in the unfair-labor-practice proceeding, factual changes that New Vista could have raised in the underlying representation proceeding.

New Vista now seeks to inject the issue before the Court. As we show below, that effort should be rejected. New Vista has waived the issue in this

litigation. In any event, as the Board reasonably found (A 8), it was procedurally improper for New Vista to offer for the first time in the unfair-labor-practice case previously available evidence of changes to the LPNs' duties that New Visa had made during the representation proceeding.

**1. New Vista has waived any challenge to the Board's finding that it cannot properly litigate, for the first time in the unfair-labor-practice case, changes it made to the LPNs' duties during the representation case**

In its brief on rehearing, New Vista for the first time on appeal challenges (Br. 48-51) the Board's rejection (A 8) of its belated attempt to litigate, in the refusal-to-bargain case, changes to the LPNs' duties that were made while the representation proceeding was ongoing. But New Vista never raised any such challenge in its opening June 2012 brief on appeal in this case. The Court's re-briefing order and relevant case law preclude New Vista from raising its new claim on rehearing.

Although the Court's August 15, 2014 order on panel rehearing directed the parties to "rebrief this matter in its entirety," the Court added an important caveat: "Any issues not specifically listed in the statement of issues and briefed, even though the issue may have been addressed in our initial adjudication . . . , shall be deemed abandoned." (*Id.*) Reasonably read, the Court's order limits the issues on rehearing to those in the original statement of issues in New Vista's

June 2012 brief. Thus, in the caveat quoted above, the subject and object (“issues” that are “deemed abandoned”) are modified by past participles; the issues deemed abandoned are those not specifically “listed” and “briefed.” Moreover, the subject is modified by a dependent clause that similarly uses the past tense to describe abandoned issues as those previously “addressed” in the Court’s initial decision. In short, by its very syntax, the caveat conveys that the parties forfeited any issues not raised in their initial briefs on appeal.

This reading of the order is in harmony with precedent, notably, the Court’s recent holding in *United States v. Quinn*, 728 F.3d 243, 264 (3d Cir. 2013), that a party could not raise, in its rehearing brief, a claim that “was not raised in [its] notice of appeal or opening brief.” *See also United States v. McCarrin*, 54 F.App’x 90, 94 (3d Cir. 2002) (holding that appellee failed to preserve constitutional challenge for en banc review “by failing to raise it in his opening brief to the prior panel of the court on direct appeal”). Thus, where, as here, a party has failed to raise an issue on direct appeal to a panel of the Court, it cannot inject that issue into the case on rehearing. New Vista’s argument (Br. 48-51) that the Board unreasonably rejected its change-of-duties claim is therefore not properly before the Court.

**2. In any event, the Board reasonably rejected, as procedurally improper, New Vista's belated offer of previously available evidence**

As noted above, in response to the Board's notice to show cause why summary judgment should not be granted, New Vista asserted (A 48-49), for the first time, that it had altered the duties of its LPNs to make them statutory supervisors on March 25, 2011, while the representation proceeding was ongoing. Applying well-established law, the Board found (A 8) that New Vista's untimely argument was procedurally improper and therefore provided no basis for denying summary judgment.

As this Court has stated, "[o]ur cases and the United States Supreme Court have held that an employer may not relitigate issues determined at the election stage absent a showing of newly discovered or previously unavailable material evidence." *NLRB v. Dover Tavern Owners' Assn.*, 412 F.2d 725, 728 n.7 (3d Cir. 1969) (citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941), as well as Third Circuit cases).<sup>8</sup> Here, New Vista has not claimed that the change-of-duties

---

<sup>8</sup> The rule against relitigation "safeguards the results of a representation proceeding from duplicative, collateral attack in a related unfair labor practice proceeding." *Pace Univ. v. NLRB*, 514 F.3d 19, 24 (D.C. Cir. 2008). Judicial enforcement of the rule in turn "protects the integrity of the administrative process by requiring a party to develop all arguments and present all available, relevant evidence at the representation proceeding," rather than "remain silent" until the unfair-labor-practice case. *St. Anthony Hosp. Sys. v. NLRB*, 655 F.2d 1028, 1030 (10th Cir. 1981).

evidence it sought to introduce in the unfair-labor-practice proceeding was “newly discovered” or “previously unavailable.” Nor could it. As the Board found (A 8), the March 25, 2011 change of duties occurred while the underlying representation proceeding was still ongoing: New Vista instituted the change just two days after filing its request for Board review of the Regional Director’s Decision and Direction of Election, and two weeks before the election.

In these circumstances, the Board reasonably found (*id.*) that New Vista “could have filed a motion to reopen the record” in the representation proceeding if it had wanted to rely on its March 25, 2011 actions as a basis for contending that its LPNs were supervisors. New Vista “did not file such a motion, however, or make any other effort to bring the alleged changes to the Board’s attention.”<sup>9</sup> (*Id.*) Moreover, New Vista failed to establish the existence of any special circumstances that would have required the Board to reexamine, in the unfair-labor-practice case, the decision made in the representation proceeding. (*Id.*) See *Superior Indus. Int’l*,

---

<sup>9</sup> New Vista makes the vague assertion (Br. 49) that the representation hearing included evidence of changes to the LPNs’ duties beginning around January 31, 2011. But in the representation proceeding New Vista did not attempt to meet its burden of proving the LPNs’ supervisory status by relying on any such incipient changes. Nor did New Vista seek to reopen the record in light of the March 25, 2011 changes it actually made. And contrary to New Vista’s suggestion (Br. 48-49), it was incumbent on New Vista, as the party bearing the burden of proof on the supervisory status issue, to present any arguments it wished to make based on pleadings in the separate unfair-labor-practice case concerning the March 25, 2011 changes. See p. 17 above. New Vista, however, did not make any such arguments in the representation proceeding.

*Inc.*, 295 NLRB 320, 321 (1989) (recognizing “special circumstances” exception to rule against relitigation). The Board, thus, reasonably found (*id.*) that New Vista’s effort to introduce the evidence belatedly in the unfair-labor-practice proceeding was a “procedurally improper” attempt “to raise an issue that could have been litigated in the representation proceeding.” *See* cases cited above p. 37 and *East Michigan Care Corp.*, 246 NLRB 458, 459 (1979) (rejecting, as improper effort to re-litigate, employer’s offer of evidence in unfair-labor-practice case regarding change in nurses’ duties that occurred during pendency of underlying representation case and could have been considered in representation case), *enforced*, 655 F.2d 721 (6th Cir. 1981).

In any event, New Vista’s belated argument does not withstand scrutiny. New Vista claims (Br. 49-50) that the Board departed from precedent (namely, *Frito-Lay, Inc.*, 177 NLRB 820 (1969)) in refusing to grant a hearing about changes to the LPNs’ duties made during the representation proceeding—changes that are also the subject of a separate unfair-labor-practice case.<sup>10</sup> But *Frito-Lay* involved an entirely different factual scenario from the one presented here.

---

<sup>10</sup> *See New Vista Nursing & Rehab.*, 358 NLRB No. 55 (2012), *application for enforcement filed*, No. 12-3524 (3d Cir. Sept. 11, 2012) (in abeyance). In this separate unfair-labor-practice case, the General Counsel alleged that New Vista unlawfully altered the duties of its LPNs in order to convert them into statutory supervisors and thereby prevent them from obtaining union representation. The

In *Frito-Lay*, the Board permitted an employer to defend against a refusal-to-bargain allegation by adducing evidence of a change in its national operations that altered some of the essential facts underlying the bargaining-unit determination made in a prior representation proceeding. 177 NLRB at 821. The Board emphasized, however, that it entertained this defense of changed factual circumstances because “the [employer’s] restructuring was clearly not for the purpose of avoiding compliance with the Board’s unit finding.” *Id.* Indeed, the employer’s proffered evidence showed that its nationwide reorganization was undertaken on the recommendation of a third-party management consulting firm, based on that firm’s independent analysis of the employer’s organization, which began before the representation proceeding was even instituted. *Id.* Given these circumstances, the Board found that “the reorganization was undertaken for legitimate business purposes, and without intent to evade the [employer’s] obligation under the certification.” *Id.* After examining the specific operational changes involved, the Board concluded that the unit previously certified was no longer appropriate and accordingly dismissed the refusal-to-bargain allegation.

Here, New Vista contends (Br. 50) that it “had a legitimate business purpose for increasing the LPNs’ supervisory duties as part of its negotiations of their

---

Board took administrative notice (A 8 n.3) of these allegations in the present unfair-labor-practice case.

demands for higher wages.” But New Vista failed to establish, as in *Frito-Lay*, that its change to the LPNs’ duties was prompted by the input of a third party or any kind of neutral analysis of the LPNs’ duties as compared to their salaries. Moreover, New Vista failed to show, as in *Frito-Lay*, that the process of change assertedly affecting the bargaining unit was set in motion before and independent of any representation proceeding. Indeed, the evidence in this case shows just the opposite: that New Vista began meeting with the LPNs about changes to their duties only *after* the Union filed its petition to represent the LPNs. (A 163.) Thus, there is no basis for an analogy between the legitimate business purpose found to support the changes in *Frito-Lay* and New Vista’s asserted purpose for the changes here.

Further preventing any analogy between the two cases is the fact that New Vista’s changes to the LPNs’ duties are under a specter of illegitimacy not at all present in *Frito-Lay*. As the Board noted (A 8 n.5), the very factual changes that New Vista seeks to exploit, as a defense to the unfair-labor-practice complaint in this case, are the subject of a separate unfair-labor-practice complaint (Board Case No. 22-CA-29845) alleging that New Vista unlawfully changed the LPNs’ duties in order to prevent them from obtaining union representation. In these circumstances, *Frito-Lay* is not apt precedent and provides no support for New

Vista's claim that the Board erred in refusing to entertain New Vista's defense of changed facts in this case.

New Vista (Br. 50-51) asserts that enforcement should be denied because the Board failed to explain, either in its August 26, 2011 order, or its December 30, 2011 order denying New Vista's motion for reconsideration, why it did not follow *Frito Lay*. Here, as explained above, the Board in its August 26, 2011 Decision and Order addressed (A 7, 8) New Vista's untimely claim (which did not cite *Frito Lay*) regarding changes to the LPNs' duties by applying the well-established rule prohibiting relitigation of issues determined in an underlying representation proceeding "absent a showing of newly discovered or previously unavailable material evidence." *NLRB v. Dover Tavern Owners' Assn.*, 412 F.2d 725, 728 (3d Cir. 1969) (internal quotation marks and citations omitted). The Board reasonably adhered (A 14) to that precedent by denying reconsideration and reaffirming its August 26, 2011 decision for the reasons previously stated. The Board is not obliged to distinguish irrelevant cases simply because they are raised by a party, and the fact that the Board did not distinguish *Frito-Lay* does not render the Board's ruling on reconsideration unreasonable.

#### **D. The Board's August 26, 2011 Final Order Is Valid**

New Vista claims (Br. 40-48) that the Board's August 26, 2011 Decision and Order is invalid because it was served on the parties and posted on the Board's

website 3 business days after Chairman Liebman’s term expired. Because she was a member of the three-member panel to whom the Board delegated authority to decide the case, New Vista argues that when the Board’s decision “issued,” there was no valid panel. As explained below, settled principles of administrative law establish that the August 26, 2011 Order is valid. Therefore, New Vista’s argument should be rejected.

The date on the Order—August 26—reflects the date on which all members had voted on the final draft, and therefore the date on which final action was taken by the Board. Thus, the three-member panel completed its deliberative process the day before Chairman Liebman’s term expired on August 27. *See NLRB, Board Members Since 1935*, <http://www.nlrb.gov/who-we-are/board/board-members-1935> (last visited Nov. 25, 2014).<sup>11</sup>

That some ministerial tasks—such as reproduction, mailing and uploading the decision to the Board’s website—occurred after Chairman Liebman’s departure does not, as New Vista claims, render the decision invalid. In this regard, *Braniff Airways, Inc. v. Civil Aeronautics Board*, 379 F.2d 453 (D.C. Cir. 1967), is

---

<sup>11</sup> New Vista cites (Br. 44-45, 48) *New Process Steel, LP v. NLRB*, 130 S. Ct. 2635 (2010), which held that the three-member group delegated all the Board’s powers ceased to exist after the term of one of its members expired, and the group therefore could not act through the remaining two members. Unlike *New Process*—where the two remaining group members continued to decide cases long after the third member’s departure (*see id.* at 2643 n.5)—here, the full delegee panel decided this case *before* Chairman Liebman’s departure.

particularly instructive. There, the party challenged an administrative decision dated June 1, 1965, as invalid because it was served the following day, after the June 1 departure of one of three deciding board members. *Id.* at 459. The court rejected the argument that service of the decision the day after the board member's departure rendered the decision invalid, stating: "once all members have voted for an award and caused it to be issued the order is not nullified because of incapacity, intervening before the ministerial act of service, of a member needed for a quorum." *Id.* See also *David B. Lilly Co. v. United States*, 571 F.2d 546, 547-49 (Ct. Cl. 1978) (quorum requirement satisfied where there was a valid quorum at completion of the "deliberative process," even though award was signed and mailed when only one board member remained).

New Vista questions whether the Board's deliberations were fully completed before Chairman Liebman left the Board, but it fails to meet its heavy burden of demonstrating any impropriety by the Board. The proceedings and decisions of governmental agencies are entitled to a presumption of regularity. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Frisby v. HUD*, 755 F.2d 1052, 1055 (3d Cir. 1985). See generally *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). To overcome this presumption, the challenging party cannot simply proffer unsubstantiated allegations, but must present "clear evidence" of irregularity on the part of the agency or its officers. See *Armstrong*,

517 U.S. at 464 (“[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties”); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). *See also NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229 (1947) (“[W]e cannot reject [the Board’s] explicit avowal that it did take into account evidence...unless an examination of the whole record puts its acceptance beyond reason.”).

New Vista presented no irregularity that warrants questioning that the Board took final action before Chairman Liebman’s term expired. The brief delay in service and other ministerial functions—all New Vista relies on—is not clear evidence that rebuts the presumption of regularity to which the Board is entitled. *See McLeod v. INS*, 802 F.2d 89, 95 n.8 (3d Cir. 1986) (presumption does not yield to claims that are “speculative and uncorroborated by objective evidence”); *Braniff*, 379 F.3d at 462 (court “cannot allow recital by an administrative agency that it has considered the evidence and rendered a decision according to its responsibilities to be overcome by speculative allegations”).

Nor does *Braniff* support New Vista’s claim (Br. 44) that the record of the vote is “essential” to determine the validity of the Board’s decision. The *Braniff* court, in determining that the board chairman was “a qualified member of the [b]oard when its deliberative process was completed”—the same day he was sworn in to a position in a different agency—relied on the facts that the “award on its face

indicated that it was concurred in and signed on June 1” by the chairman and the other two board members, and that the chairman was sworn in to his new office only after presiding at the board’s June 1 conference. 379 F.d at 459. Similarly, August 26—the date on the decision—is when all members had voted on the final draft, and it is undisputed that Chairman Liebman’s term expired the following day. (A 13.)

There is no merit to New Vista’s claim (Br. 46-48) that regulations relating to Board meetings require the Board to maintain records that should be included in the record before the Court. As the Board has previously advised the Court,<sup>12</sup> there are no minutes in connection with the August 26, 2011 Decision and Order;<sup>13</sup> in any event, minutes are not part of the administrative record under applicable agency regulations (29 C.F.R. 102.45(b), 102.68); and there is no basis for any supplementation of the record. *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623-24 (D.C. Cir. 1997), is inapposite. *Alvarez* reaffirmed the general rule requiring a “strong showing of bad faith or improper behavior to justify supplementing the record.” *Id.* at 624. As shown, New Vista has not made any such showing or otherwise

---

<sup>12</sup> Board’s Opposition to Motion of New Vista for Remand etc., filed May 3, 2012.

<sup>13</sup> The Board here followed its routine practice of notational or sequential voting; therefore, there was no meeting and no “minutes.” The Board, like other agencies, follows that practice consistent with its authority and responsibility to promote effective administration and enforcement of the Act.

overcome the presumption of regularity applicable to the Board's decision-making process.

In sum, New Vista's speculative assertion that Chairman Liebman did not participate in the August 26, 2011 Decision and Order is at odds with controlling precedent. As shown, settled principles of administrative law establish that the Board had a quorum to issue its August 26, 2011 Decision and Order, which found that New Vista violated the Act.

#### **E. The Court Should Reject New Vista's Arguments that the Case Should Be Remanded**

New Vista argues that the Court should partially remand this case to the Board on two separate grounds. First, New Vista (Br. 51-53) challenges the validity of the Board quorum that issued the December 30, 2011 Order denying its first motion for reconsideration. Second, New Vista argues that because the Board panels that denied its subsequent motions for reconsideration were improperly constituted under *Noel Canning*, the Court should remand for consideration of those motions by a properly constituted panel. As we show, remand is neither necessary nor warranted in this case.

##### **1. A proper Board quorum denied New Vista's first motion for reconsideration**

New Vista argues (Br. 51-53) that the Board's December 30 order is invalid because the Board acted without the statutorily required quorum in delegating its

authority to rule on New Vista's first motion for reconsideration to a three-member panel. Initially, the Court need not reach this claim. First, there is no need for the Court to consider whether a Board quorum addressed the issue of Chairman Liebman's participation in the Board's August 26 final order, because, as shown above, that issue is governed by settled principles of administrative law. Second, for the reasons shown above pp. 35-37, New Vista's claim that its change of LPNs' duties justified its refusal to bargain is not properly before the Court.

In any event, contrary to New Vista's claim, the delegation was consistent with the text of Section 3(b) of the Act (29 U.S.C. § 153(b)) and the Board's longstanding practice, which was recognized approvingly in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Section 3(b) sets forth the delegation and quorum requirements under which the Board operates, and states in relevant part:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise . . . . [T]hree members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

By its terms, the delegation clause in the first sentence authorizes the Board to delegate its authority to a three-member group. The group quorum provision provides that two members shall constitute a quorum of any such three-member group. *See New Process*, 130 S. Ct. at 2640.

When the December 30, 2011 Order issued, the Board had three sitting members—Chairman Pearce, and Members Becker and Hayes. The Order explicitly states that the “Board has delegated its authority in this proceeding to a three-member panel.” (A12). Chairman Pearce, noting his recusal, stated that he was a “member of the present panel but did not participate in deciding the merits of the proceeding.” (*Id.* n.2.) Accordingly, Members Becker and Hayes, acting as a two-member quorum of that delegee group as provided by Section 3(b), issued the Order. (A12-14.)

In so proceeding, the Board followed its longstanding practice when it has only three sitting members, one of whom is recused from a particular matter. *See, e.g., 1621 Route 22 West Operating Co.*, 357 NLRB No. 153, slip op. 1 n.1 (Dec. 30, 2011), *petition for review filed*, No. 12-1031 (3d Cir. Jan. 9, 2012) (in abeyance); *Pacific Bell Tel. Co.*, 344 NLRB 243, 243 & n.1 (2005); *Bricklayers, Local #5-N.J.*, 337 NLRB 168, 168 & n.4 (2001); *Cable Car Advertisers, Inc.*, 336 NLRB 927, 927 & n.1 (2001), *enforced*, 53 F. App’x 467 (9th Cir. 2002); *McDonnell Douglas Corp.*, 324 NLRB 1202, 1202 & n.4 (1997); *G. Heileman Brewing Co.*, 290 NLRB 991, 991 & n.1 (1988), *enforced*, 879 F.2d 1526 (7th Cir. 1989). Each of those decisions issued when the Board had only three sitting

members.<sup>14</sup> And in each case, the Board delegated its authority to a three-member panel, which included the recused member, who noted his or her nonparticipation on the merits, and the case was decided by a two-member quorum of the delegee group.

New Vista incorrectly argues (Br. 51-53) that the Board’s longstanding practice runs afoul of the Supreme Court’s decision in *New Process* that Section 3(b) requires that the “delegee group maintain a membership of three in order to exercise the delegated authority of the Board.” 130 S. Ct. at 2638, 2644. That argument fails on its own terms because, as just shown, the three-member group delegated the authority to decide this matter did maintain its membership of three, notwithstanding that one member was recused. And contrary to New Vista’s position, the Supreme Court in *New Process* approvingly recognized the Board’s practice of issuing decisions with a two-member quorum of a three-member delegee group when the third member was recused.

Thus, the *New Process* Court contrasted the situation before it—where the third member (of the group and the Board) leaves the Board—with the Board’s “longstanding” practice when a member of the delegee group is recused. *Id.* at 2644. As the Court stated, “the Board has throughout its history allowed two

---

<sup>14</sup> See *Board Members Since 1935*, National Labor Relations Board (last viewed Nov 25, 2014), available at <http://www.nlrb.gov/who-we-are/board/board-members-1935>.

members of a three-member group to issue decisions when one member of a group was disqualified from a case . . . .” *Id.* at 2641. The Court explained that, while Section 3(b) requires the Board’s powers to be vested at all times in a group of at least three sitting Board members, the delegation clause of Section 3(b) “still operates to allow the Board to act in panels of three, and the group quorum provision still operates to allow any panel to issue a decision by only two members if one member is disqualified,” and that so reading the statutory language gives effect to all provisions of Section 3(b). *Id.* at 2640, 2644. As the Board noted, *New Process* left “undisturbed” the practice of proceeding in this manner. (A 12 n.2.)

New Vista nonetheless argues (Br. 52) that the Board’s delegation was invalid because Chairman Pearce was “previously recused . . . [and therefore] could not participate in the decision to delegate to a panel.” If New Vista is suggesting that Chairman Pearce did not actually participate in the delegation, that claim ignores the three-member Board’s statement that it delegated its authority in this proceeding to the panel, and Chairman Pearce’s statement that he was a member of the present panel. New Vista provides no basis for looking behind those statements. *See* cases on the presumption of regularity accorded to agency decision-making cited above pp. 44-45.

Nor did Chairman Pearce's recusal bar him from participating in the unfair-labor-practice proceeding for the limited purpose of delegating the motion to a three-member delegee group of which he is a member but not a participant in ruling on the motion. His limited participation here is no different from those of the recused Board members in the cases cited above p. 49, which reflect the Board's longstanding practice where it has only three sitting members, one of whom is recused in a particular case.

Construing Section 3(b) as permitting Chairman Pearce's limited participation is consistent with the common law "rule of necessity."<sup>15</sup> *See generally* *FTC v. Flotill Products, Inc.*, 389 U.S. 179, 183-86 (1967) (recognizing that Congress enacted statutes creating federal administrative agencies against the backdrop of the common-law quorum rules). That rule enables an otherwise-recused member of a body to participate in the decision on the merits, in order to achieve a quorum. Thus, the rule of necessity may "require[] an adjudicatory body (judges, boards, commissions, etc.) with *sole or exclusive* authority to hear a matter to do so even if the members of that body have prejudged the results of a particular hearing." *Valley v. Rapides Parish School Board*, 118 F.3d 1047, 1052 (5th Cir. 1997); *see also* *United States v. Will*, 449 U.S. 200, 213 (1980) (rule of necessity

---

<sup>15</sup> *See* *United States v. Will*, 449 U.S. 200, 213-216 (1980); *Atkins v. United States*, 556 F.2d 1028, 1036-38 (Ct. Cl. 1977).

allows a judge, normally disqualified because he has a conflict of interest, to hear a case when “the case cannot be heard otherwise.”); *Marquette Cement Mfg. Co. v. FTC*, 147 F.2d 589, 593-94 (7th Cir. 1945) (“rule of necessity” applied to administrative agency with sole power to decide case); *Siteman v. City of Allentown*, 695 A.2d 888, 892 (Pa. Cmwlth. 1997) (court vacated city council resolution passed without a quorum, but remanded for council to apply rule of necessity and reconsider the case with quorum, including the recused members).

While the common law rule permits a disqualified adjudicator to participate in a decision on the merits, here Chairman Pearce’s participation was more limited and tailored to procedures set out in Section 3(b). By participating only in the delegation of the case to the three-member panel, and not the decision on the merits, Chairman Pearce enabled the Board to issue a decision, by a two-member quorum, as permitted by Section 3(b) of the Act.

## **2. *Noel Canning* does not require a partial remand**

New Vista contends (Br. 34) that the Court must partially remand the case because the Board panel that denied New Vista’s second motion for reconsideration, which challenged Chairman Pearce’s participation in the December 30, 2011 order, included members whose appointments were held invalid in *Noel Canning*. The Board recognizes that, under *Noel Canning*, the panel that denied the second motion for reconsideration was not properly

constituted. Nevertheless, in the circumstances of this case, remand for a properly constituted panel to rule on New Vista's second motion for reconsideration is not warranted. As an initial matter, that second reconsideration motion only challenged the validity of the Board panel that decided the first reconsideration motion, and, as explained above pp. 34-47, the case can be resolved in the Board's favor without the Court having to reach the issue of the validity of that panel. Furthermore, even if that panel's validity *were* before the Court, the propriety of the Chairman Pearce's involvement in the Board's December 30, 2011 order denying reconsideration presents a legal question, and for the reasons explained above, his limited participation fully comported with applicable legal standards. Accordingly, there is no need for a remand so that the Board can address New Vista's erroneous assertion that Chairman Pearce improperly participated in that order while recused.

Nor is a remand necessary to address New Vista's third motion for reconsideration, which claimed that the term of Member Becker, who served on the panel that entered the December 30, 2011 order, ended before that date. New Vista waived that argument by failing to present it in its opening brief on rehearing. *United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) (issues not raised in opening brief are waived). In any event, Member Becker's term did not end on or prior to December 30, 2011, and in fact extended until January 3, 2012,

when one Senate session ended and the next session began. As *Noel Canning* made clear, a Senate session ends when the Senate adjourns *sine die*. *See id.* at 3560-61 (discussing distinction between inter-session recesses, which commence with adjournment *sine die*, and intra-session recesses, where adjournment is to a fixed date). Because the Senate did not adjourn *sine die* before December 30, 2011,

Member Becker's term did not end prior to Board's issuance of the December 30 order. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 352 (5th Cir. 2013).<sup>16</sup>

---

<sup>16</sup> Similarly, there is also no need to remand the case to the Board for consideration of New Vista's fourth motion for reconsideration, which took issue with the composition of the Board panel that rejected New Vista's second and third motions for reconsideration challenging the makeup of the panel that issued the December 30, 2011 order. As stated, the Board recognizes that those panels were not properly constituted, but, for the reasons set forth above, remand for new orders disposing of those motions is not necessary in the circumstances.

## CONCLUSION

The Board respectfully requests that the Court enter a judgment denying New Vista's petitions for review and enforcing the Board's Order in full.

/s/ Julie B. Broido

JULIE B. BROIDO

*Supervisory Attorney*

/s/ Milakshmi V. Rajapakse

MILAKSHMI V. RAJAPAKSE

*Attorney*

National Labor Relations Board  
1099 14th Street N.W.  
Washington, D.C. 20570  
(202) 273-2996  
(202) 273-1778

RICHARD F. GRIFFIN, JR.

*General Counsel*

JENNIFER ABRUZZO

*Deputy General Counsel*

JOHN H. FERGUSON

*Associate General Counsel*

LINDA DREEBEN

*Deputy Associate General Counsel*

National Labor Relations Board

November 2014

H:/FINAL/New Vista-final brief on rehearing-jbmr

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

and

1199 SEIU, UNITED HEALTH CARE WORKERS  
EAST, N.J. REGION

Intervenor

v.

NEW VISTA NURSING AND REHABILITATION,  
LLC

Respondent/Cross-Petitioner

\*  
\*  
\* Nos. 11-3440  
\* 12-1027  
\* 12-1936  
\*  
\* Board Case No.  
\* 22-CA-29988  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,962 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

/s/ Linda Dreeben

Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, D.C.  
this 25th day of November 2014

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

and

1199 SEIU, UNITED HEALTH CARE WORKERS  
EAST, N.J. REGION

Intervenor

v.

NEW VISTA NURSING AND REHABILITATION,  
LLC

Respondent/Cross-Petitioner

\*  
\*  
\* Nos. 11-3440  
\* 12-1027  
\* 12-1936  
\*  
\* Board Case No.  
\* 22-CA-29988  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 25, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at their address listed below:

Louis J. Capozzi, Jr.  
Capozzi Adler, P.C.  
P.O. Box 5866  
Harrisburg, PA 17110

Morris Tuchman  
134 Lexington Avenue, 2<sup>nd</sup> Floor  
New York, NY 10016

William S. Massey  
Gladstein, Reif & Meginniss  
817 Broadway, 6th Floor  
New York, NY 10003

/s/ Linda Dreeben

Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, D.C.  
this 25th day of November 2014